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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re)	No.	01-30923 DM
PACIFIC GAS & ELECTRIC COMPANY,)	Chapter	11
Debtor.)	Date:	July 10, 2001
)	Time:	9:30 p.m.
)	Place:	235 Pine St., 22 nd Floor
)		San Francisco, California

**UNITED STATES TRUSTEE'S RESPONSE TO DRESDNER KLEINWORT &
WASSERSTEIN'S REPLY TO OBJECTION TO APPLICATION TO EMPLOY**

Introduction

Dresdener Kleinwort & Wasserstein (DrKW) argues for approval of its employment with indemnity terms as customary in the commercial world and bankruptcy cases for financial advisors and investment bankers.^{1/} It does not succeed in either establishing the custom or showing indemnity is consistent with the fiduciary duty of a professional to the estate in bankruptcy's regulated environment. DrKW's argument that it is not a fiduciary but rather an independent contractor with limited powers is a dodge. The description of its work gives DrKW a crucial role. DrKW brings the highest skill levels and compensation demands to the case and has not even hinted that its role will be other than that of skilled professional.

^{1/} Aside from indemnification, all issues, including the application of New York law, have been resolved.

1 **1. PG&E and DrKW Have Not Met Their Burden to Show Indemnity Is in the Best**
2 **Interests of the Estate.**

3 Debtor Pacific Gas & Electric Co. (PG&E) and DrKW bear the burden of proving the
4 terms and conditions of DrKW's employment are in the best interests of the estate. *In re*
5 *Gillett Holdings, Inc.*, 137 B.R. 452, 455 (to meet this burden, the debtor must provide
6 specific evidence to establish that "the terms and conditions are in the best interest of the
7 estate;" quoting *In re C & P Auto Transp., Inc.*, 94 B.R. 682, 686 (Bankr. E.D. Cal. 1988);
8 accord *In re Chas. A. Stevens & Co.*, 109 B.R. 853,854 (Bankr. N.D. Ill. 1990). They have
9 failed to prove indemnity is in the estate's best interests.

10 **2. They Cannot Meet the Burden Because Indemnity Is Inconsistent with Their**
11 **Fiduciary Duty in Bankruptcy.**

12 The burden can not be met because indemnification is inconsistent with a
13 professional's fiduciary duty in bankruptcy. *In re Mortgage & Realty Trust*, 123 B.R. 626, 63
14 (Bankr. C.D. Cal. 1991) ("[i]ndemnification is not consistent with professionalism"); *In re*
15 *Drexel Burnham Lambert Group*, 133 B.R. 13, 27 (Bankr. S.D.N.Y. 1991) ("[s]imply stated,
16 indemnification agreements are inappropriate"); *In re Gillett Holdings, Inc.*, 137 B.R. 452, 458
17 (Bankr. D. Colo. 1991) ("entirely improper and unacceptable").

18 **3. DrKW is a Fiduciary and, in Any Event, Its Duty Stems from Its Role as a**
19 **Professional in Bankruptcy.**

20 DrKW argues it is not a fiduciary but instead an independent contractor with a limited
21 role. The argument is unavailing in three respects. First, it plays fast and loose with labels in
22 a self-serving attempt to avoid responsibility and liability. A rose by any other name is still a
23 rose. DrKW can be asked by the debtor to take on a central role in devising, negotiating and
24 testifying with respect to a plan, restructuring and issuing securities under a plan. DrKW's
25 hedge is an employment term that says it gives only advice and does not bind the debtor.
26 Given DrKW's statement of work, it would be a difficult, if not impossible, line to draw
27 between advising PG&E and launching PG&E on a pivotal course of action.

28 Second, and more importantly, whether it will be doing these important tasks as an

1 advisor or otherwise, DrKW will be acting as a highly skilled and highly compensated
2 professional whose duty of care to the estate is inconsistent with being held harmless for
3 negligence. Professionals, whether they advise or bind their clients, act as fiduciaries in
4 bankruptcy. We note DrKW has been careful not to deny it is a professional. Being a
5 professional is a condition precedent to employment and compensation in bankruptcy.

6 Third and finally, the fiduciary concept DrKW postulates is not applicable. DrKW cites
7 traditional trust law to show it is not a fiduciary, i.e., it does not have a superior position of
8 knowledge and power vis a vis an unsophisticated beneficiary - the debtor. In bankruptcy,
9 the beneficiary is the estate. The debtor's sophistication is irrelevant. The debtors and their
10 professionals always owe a fiduciary duty to the estate. See, e.g. *In re Perry*, 194 B.R. 875,
11 880 (E.D. Cal. 1996) (the debtor cannot waive a conflict in employing a professional for the
12 estate; quoting *In re Amdura*, 121 B.R. 862, 866 (Bankr. D. Colo. 1990) "multiple
13 representation of clients that may be acceptable in a commercial setting... may not be
14 acceptable in bankruptcy").

15 **4. Employment Terms Need Not Be Approved Even if They Are Customary.**

16 DrKW argues this court must allow it indemnity because it is customary in private
17 engagements in its specialty. DrKW does not prove it is customary, but even if it could, what
18 is customary in a private contract does not end the inquiry. Whether a term of employment is
19 customary in the industry is only one factor the court must consider. Bankruptcy
20 responsibilities come first.

21 [a]lthough due deference should be given to the standards applicable to certain
22 professions outside of the bankruptcy context - and professionals are entitled to
23 compensation in bankruptcy cases comparable to that earned in non-bankruptcy
cases - this Court is not bound absolutely to those standards. Rather it is bound, first,
by the dictates of the Bankruptcy Code.

24 *In re Gillett Holdings, Inc.*, 137 B.R. at 456.

25 DrKW cites *In re Busy Beaver Bldg. Centers, Inc.*, 19 F.3d 833, 841 (3d Cir. 1994) for
26 the proposition that indemnity should be approved because it is part of the customary
27 compensation or cost of services outside bankruptcy. DrKW Reply Brief at 5. In considering
28 the award of reasonable fees, the *Busy Beaver* court construed § 330 as requiring

1 consideration of charges for comparable services in private practice. *Id.* Construction of §
2 330 is not applicable here because the term “compensation” as used in § 330 “is to be
3 provided in money or money’s worth.” Mortgage & Realty Trust, supra, 123 B.R. at 631. An
4 indemnification provision does not fall within the scope of this statutory language. *Id.* This
5 interpretation is bolstered by the Senate’s reference to “rates” as a synonym for
6 “compensation” and to the Senate’s admonition that § 330 is not intended as a change of
7 existing law. Senate Report No. 95-989, 95th Cong., 2d Sess. 40 (1978).

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9 **5. Assuming *Arguendo* Custom Might Support Indemnity, Custom Has Not Been Shown.**

10 Finally, assuming, *arguendo*, that custom in commercial and bankruptcy settings might
11 support indemnification, PG&E and DrKW fail in their burden to establish custom in either
12 setting. The only evidence of commercial custom offered is an inconclusive statement from
13 DrKW’s Kenneth Buckfire and from PG&E’s Kent Harvey. In addition to being conclusory,
14 Mr. Harvey’s opinion is objectionable as based on information and belief (his “understanding”
15 of the industry).

16 To show bankruptcy practice, DrKW cites two appellate decisions, one reported, *Joan*
17 *and David Halpern*, 248 B.R. 43, *aff’d.*, 2000 W.L. 1800690 (S.D.N.Y. 2000) and the other
18 not, *United Artists Theatre Co.*, (D. Del. Dec.1, 2000, order employing Houlihan Lokey).
19 DrKW also offer copies of seven orders in five different bankruptcy cases. The cases are
20 hardly compelling in the face of numerous reported decisions for the strong policy to the
21 contrary. In addition, DrKW fails to point out that one of the appellate decisions and one of
22 the orders DrKW offers have been appealed. *United Artists Theatre Co.*, (D. Del. Dec.1.
23 2000, D. Ct. decision affirming bankruptcy court order employing Houlihan Lokey), on appeal
24 to the Third Circuit, docketed as No. 01-1351; and, *LTV Steel Co.*, Bk. No. 00-43866,
25 (Bankr. N.D. Ohio, E.D.), March 21, 2001, order employing Jay Alix & Assoc, on appeal to the
26 D. Ct., N.D. Ohio, E.D. Div., docketed as Civ No. 4: 01CV01116

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1 **Conclusion**

2 Based on the foregoing, DrKW's employment should not be approved unless the
3 indemnification provisions are stricken.

4 Date: July 3, 2001

5 Respectfully submitted,

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7 By:

8 Patricia A. Cutler
9 Assistant United States Trustee
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